The Medical Center at Bowling Green *and* Kentucky Nurses' Association. Case 9-CA-17858

May 12, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

Upon a charge filed on January 13, 1982, by Kentucky Nurses' Association, herein called the Union, and duly served on The Medical Center at Bowling Green, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 9, issued a complaint on January 27, 1982, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on June 30, 1981, following a Board election in Case 9-RC-13692,[1] the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate; and that, commencing on or about October 20, 1981, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On February 8, 1982, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On February 19, 1982, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on March 2, 1982, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to the Notice To Show Cause and Cross-Motion for Summary Judgment.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint and response to the Notice To Show Cause and its Cross-Motion for Summary Judgment, Respondent admits its refusal to bargain, but denies the material 8(a)(1) and (5) allegations of the complaint, asserting as its affirmative defenses: (1) that the Regional Director improperly failed to rule in Case 9-RC-13692 on the supervisory status of unit directors; (2) that the Regional Director improperly refused to accept the parties' stipulation to exclude certain employees from the bargaining unit as professionals; (3) that the Board improperly denied Respondent's request for review of the Regional Director's Decision and Direction of Election; (4) that the Regional Director improperly failed to sustain Respondent's objections; and (5) that the Board improperly denied Respondent's request for review of the Regional Director's Supplemental Decision and Certification of Representative. Counsel for the General Counsel argues that there are no matters warranting a hearing because the issues concerning the Union's certification were litigated and determined in the underlying representation case. We agree with the General Counsel.

A review of the record herein, including that of the representation proceeding in Case 9-RC-13692, shows that on April 16, 1982, the Regional Director issued a Decision and Direction of Election in a unit of registered nurses. The Regional Director also, *inter alia*, excluded licensed practical nurses from the unit, permitted unit directors to vote subject to challenge, and, contrary to the parties' stipulation, permitted the director of inservice education, utilization review nurse, certified registered nurse anesthetists, employee health nurse, and infection control nurse to vote subject to challenge. Thereafter, Respondent filed a timely request for review of the Regional Director's Decision and Direction of Election. On May 14, 1981, the Board by telegraphic order, with Member Jenkins dissenting in part as to the Regional Director's refusal to honor the parties' stipulation, denied Respondent's request as it raised no substantial issues warranting review. The Union won the election conducted on May 14, 1981, by a 94–22 margin, with 27 challenged ballots. Thereafter, Respondent filed timely objections to the election alleging that (1) the Regional Director's failure in his Decision and Direction of Election to rule with regard to the supervisory status of unit directors prevented Respondent

[1] Official notice is taken of the record in the representation proceeding, Case 9-RC-13692, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co. v. Penello*, 269 F.Supp. 573 (D.C.Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

from effectively communicating its position concerning the union campaign to its employees, and (2) the unit directors were extensively involved in the campaign on behalf of the Union, thereby creating the likelihood that employees were coerced into voting for the Petitioner. On June 30, 1981, after investigation of Respondent's objections, the Regional Director issued a Supplemental Decision and Certification of Representative in which he overruled Respondent's exceptions in their entirety and certified the Union. Respondent timely filed a request for review of the Supplemental Decision. By telegraphic order dated September 10, 1981, the Board denied the request as it raised no substantial issues warranting review.

On or about October 12, 1981, the Union, by letter, requested that Respondent bargain with it collectively as the exclusive collective-bargaining representative of the unit employees. Respondent has admitted its denial of the Union's October 12 request and its refusal since October 20, 1981, to recognize or bargain with the Union.[2]

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[3]

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation any newly discovered or proceeding,[4] and Respondent does not offer to adduce at a hearing previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the General Counsel's Motion for Summary Judgment and deny Respondent's Cross-Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent, a Kentucky corporation, is engaged as a health care institution in the operation of a nonprofit hospital at Bowling Green, Kentucky. During the past 12 months, a representative period, Respondent in the course and conduct of its business operations received gross revenues in excess of $250,000. During the same period of time, Respondent purchased and received goods and materials, valued in excess of $50,000, at its Bowling Green, Kentucky, facility directly from points outside the State of Kentucky.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

Kentucky Nurses' Association is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Representation Proceeding*

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All registered nurses employed by the Respondent at its Bowling Green, Kentucky, Hospital, excluding all other employees, all office clerical employees, and all guards and supervisors as defined in the Act.

2. The certification

On May 14, 1981, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 9, designated the Union as their representative for the purpose of collective bargaining with Respondent.

The Union was certified as the collective-bargaining representative of the employees in said unit on June 30, 1981, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

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[2] We grant the General Counsel's motion of March 16, 1982, to substitute G.C. Exh. G, the Union's letter of October 12, 1981, demanding recognition from Respondent, for G.C. Exh. E, the Union's February 18, 1981, letter requesting recognition. Both the complaint and the Motion for Summary Judgment refer to the Union's October 12, 1981, letter requesting that Respondent bargain collectively with it. Having granted the General Counsel's motion, we find no merit to Respondent's assertion that the pleadings failed to state a claim on which relief can be granted because the February 1981 request for recognition was prior to any majority showing by the Union.

[3] See *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

[4] We find no merit to Respondent's affirmative defense that it is not obligated to bargain with the Union on the basis that the Regional Director failed to determine the unit placement of certain employees. The Board has long held that, when a union has demonstrated its majority status, an unresolved question of the unit placement of certain employees does not affect either the basic appropriateness of the certified unit or the parties' obligation to bargain with respect to that unit. *National Press, Inc.*, 241 NLRB 1000 (1979); and *The May Department Stores Company*, 186 NLRB 86, fn. 5 (1970).

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about October 12, 1981, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about October 20, 1981, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since October 20, 1981, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. The Medical Center at Bowling Green is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. Kentucky Nurses' Association is a labor organization within the meaning of Section 2(5) of the Act.
3. All registered nurses employed by Respondent at its Bowling Green, Kentucky, Hospital, excluding all other employees, all office clerical employees, and all guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.
4. Since June 30, 1981, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.
5. By refusing on or about October 20, 1981, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.
6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.
7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, The Medical Center at Bowling Green, Bowling Green, Kentucky, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Kentucky Nurses' Association as the exclusive bargaining representative of its employees in the following appropriate unit:

All registered nurses employed by the Respondent at its Bowling Green, Kentucky, Hospital, excluding all other employees, all office clerical employees, and all guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Bowling Green, Kentucky, hospital copies of the attached notice marked "Appendix."[5] Copies of said notice, on forms provided by the Regional Director for Region 9, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

[5] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(c) Notify the Regional Director for Region 9, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Kentucky Nurses' Association as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All registered nurses employed by us at our Bowling Green, Kentucky, Hospital, excluding all other employees, all office clerical employees, and all guards and supervisors as defined in the Act.

THE MEDICAL CENTER AT BOWLING GREEN